NO. 48846-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

LA'JUANTA LE'VEAR CONNOR,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 11-1-00435-8

BRIEF OF RESPONDENT

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SERVICE		
	John A. Hays 1402 Broadway Longview, Wa 98632 Email: jahays@3equitycourt.com	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED October 12, 2016, Port Orchard, WA _____ **Original e-filed at the Court of Appeals; Copy to counsel listed at left.** **Office ID #91103 kcpa@co.kitsap.wa.us**

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court erred in not ruling on Conner's CrR 7.8 (c) motion where that motion was not properly noted, where defense counsel wanted the motion hearing continued, where the newly discovered evidence motion did not address newly discovered evidence, and where most of the motion is not credible on its face?

2. Whether the matter can be appealed when the trial court made no decision and entered no order on the merits of the motion?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY[1]

La'Juanta Le'Vear Conner was charged by original information filed in Kitsap County Superior Court with conspiracy to commit burglary in the first degree, conspiracy to commit robbery in the first degree, and unlawful possession of a firearm in the second degree. CP 1-4. That information was filed on June 8, 2011. CP1.

Just over ten months later, on April 12, 2012, a first amended information was filed. CP 10. That information included 26 counts. Id. Conner proceeded to trial under a second amended information with the same 26 counts. CP 33. The first six counts were based on offenses that

[1] Clerk's papers received on the present appeal are denominated as "CP." Reference to the Clerk's papers from the initial appeal are denominated "1CP."

occurred the day he was arrested, November 17, 2010:

1 Conspiracy to commit first-degree burglary

2 Second-degree unlawful possession of a firearm (a Hi-Point .40 revolver)

3 Possession of a stolen firearm (the Hi-Point)

4 Second-degree unlawful possession of a firearm (a Taurus .44 semiautomatic)

5 Possession of a stolen firearm (the Taurus)

6 Possession of marijuana

CP 33-37. The second four were based on a home invasion on Twelfth Street on September 9, 2010:

7 First-degree robbery of Robert Dato

8 First-degree robbery of Aaron Dato

9 First-degree burglary

10 Second-degree theft

CP 37-40. The third group involved a second home invasion of the same Twelfth Street residence on September 28, 2010:

11 First-degree robbery of Robert Dato

12 First-degree robbery of Aaron Dato

13 First-degree robbery of Jeffrey Turner

14 First-degree burglary

15 Second-degree theft

CP 40-45. The next three charges were related to a home invasion on Shore Drive, also on September 28:

16 First-degree robbery Brett Cummings

17 First-degree burglary

18 Third-degree theft from Cummings (GM)

CP 45-47. On the night of October 2-3, 2010, Conner participated in a burglary at the Weatherstone Apartments, resulting in the following charges:

19 First-degree burglary

20 Second-degree theft from Kimberly Birkett

CP 48-49. The final home invasion took place on the evening of November 3-4, 2010, at a home on Wedgwood Lane:

21 First-degree robbery of Aaron Tucheck

22 First-degree robbery of Keefe Jackson

23 First-degree burglary

24 Theft of a firearm

25 Second-degree theft of an access device, a debit card belonging to Ann Marie Tucheck

CP 49-53. Finally, a post-arrest search of the apartment of Conner's girlfriend, Rachel Duckworth, on November 19, 2010, resulted in Count 26, a charge of third-degree possession of stolen property. CP 53.

All burglary and robbery counts included a special allegation that Conner or an accomplice were armed with a firearm under RCW 9.94A.602. All felony counts included special allegations of the multiple current offense aggravating circumstance under RCW 9.94A.535(2)(c). Counts 9, 14, 17 and 23 included special allegations of the aggravating circumstance that a victim was present during a burglary under RCW 9.94A.535(3)(u). CP 39-51.

After a trial, the jury acquitted Conner on Counts 6 and 26, and did not find that he was armed with a firearm as to Count 9. 1CP 302, 308, 312. On all other counts and special allegations, Conner was convicted as charged. 1CP 300-15, 325. The trial court imposed a standard-range sentence of 1148.5 months, which included 13 firearm enhancements. CP 63.

This Court by unpublished opinion affirmed all convictions except theft third degree. CP 75; *State v. La'Juanta Le'vear Conner,* No. 43762-7-II (consolidated with Personal Restraint Petition, No. 45418-1-II). The matter was remanded for resentencing on this Court's order vacating the theft third degree and finding only 12 firearm enhancements. CP 104.

At resentencing, the trial court pronounced the same sentence as before. CP 141. The theft third did not affect the standard range and the trial court once again counted 13 firearm enhancements. CP 138-39.

Conner asserted a CrR 7.8 motion at resentencing. CP 107. Relying on CrR 7.8(c) (2), which refers to newly discovered evidence, Conner argued that his trial counsel was ineffective because trial counsel never told him of a plea offer, never told him he was looking at 95 years, and never told him he would get 65 years on firearms enhancements. CP 108. Trial counsel had been disbarred since the first sentencing hearing.

The prosecutor present at resentencing said that she had in fact placed a plea offer on the record. RP, 3/25/16, 4. New defense counsel argued the point, saying that memories can be faulty. RP, 3/25/16, 8-9. Counsel asserted that Conner did not remember this happening. Id. During the hearing, among other things, Conner said

> But I also want to make the record for you too. If Mr. Longacre said "Mr. Conner, you're looking at 65 years and gun enhancements, period," I would have asked for a deal, period. I

regret it to this day because it took me away from my kids.

Id. at 24.

Significantly, during resentencing, new counsel for Conner indicated that the motion had not been properly noted and had been provided to the trial court one hour before the hearing. RP, 3/25/16, 7. "I'm asking the court not to address the 7.8 motion. . ." Id. at 29. Counsel had explained that that request was because he was unprepared to proceed (Id. at 28) and because he was not sure whether Conner had supported the motion with an affidavit. Id. at 28-29. Counsel finished his remarks by saying that he should not have said he was ready to proceed on the 7.8 motion and "my request is that we set that over pursuant to the rule." Id. at 30.

In fact Conner had filed a declaration in support of his motion. CP 125-128. There, Conner alleges that Longacre never advised him of a plea offer, never told him he was looking at so much time, and never told him about 65 years in firearms enhancements. Id. He alleges that had he known of a plea offer he would have taken it. Id.

The trial court did not decide Conner's 7.8 motion. RP 30. The trial court accepted the recollection of the prosecutor that the prosecutor had placed an offer on the record. Id. The trial court wanted Conner to provide more information, saying "you will need to get transcripts in order

to be able to perfect that issue for review." Id. The trial court ruled that the notion was not properly before the court. Id.

At a pretrial status hearing on October 6, 2011, Conner was present in court. RP, 10/6/11, 2. Mr. Longacre was upset about discovery and was asking to continue the trial date. In Conner's presence, Mr. Longacre said to the court

> So I'm just -- I need another 30 days. This is a case that includes 27 counts. The gun enhancements alone -- alone -- amount to 70 years, by my count. I could be off by five or ten. But it's 70 years. I think we're now up to six incidents charged, six particular incidents. Out of the six incidents, if they run consecutively, it will run probably another 40 to 50 years.

Id. at 3-4. Thus, Mr. Longacre told Conner his risk in open court. Mr. Longacre over-estimated the gun enhancements by five years and the total sentence by 20 to 30 years (70 + 40 or 50).

Again, at another pretrial hearing on April 12, 2012, the prosecutor asked the trial court to assure that Conner understood the firearm enhancements and special allegations in the first amended information. RP, 4/12/12, 38. The trial court then proceeded to advise Conner as to the enhancements and special allegations in each count to which they applied. Id. The trial court told Conner that

> it does add an additional 60 months to the presumptive range of the

> confinement for the first offense and 120 is added for the second or subsequent offense, and this, as you may already know, is what we call dead time. There is no good time credit off of the enhancements. Do you understand.

Id. Conner responded "Yes, ma'am." Id. The process was repeated for each count with the addition of the trial court adding that the enhancements would run consecutively. At the end, the trial court asked "Do you have any questions about any of those?" Conner replied "No." Id. at 41. Contrary to these facts, at the resentencing hearing, Conner alleged that "I didn't even find out about my gun enhancements until sentencing." RP, 3/25/16, 26.

Conner filed his own personal restraint petition. There, in arguing prosecutorial vindictiveness, Conner wrote

> When Conner *refused to plead guilty to the three counts* [conspiracy to commit burglary in the first degree, conspiracy to commit robbery in the first degree, and unlawful possession of a fire arm second degree] like his coconspirators/codefendants, the State amended the charges to a total of 26 counts based on criminal conduct that was not supported by probable cause.

PRP, Court of Appeals No. 45418-1-II at 14 (emphasis added). Conner came to the case with one felony point for a theft in the first degree conviction. CP 60. Had he not refused, the three counts would have resulted in a top end if 51 months.[2] For nine months these were the charges against Conner and, contrary to his assertions now, he refused to

[2] The robbery one charge with 4 points = 51-68 standard range, reduced by one quarter as conspiracy generates a high end of 51 months with the other crimes concurrent and no

consider a plea as charged.[3]

B. FACTS

The substantive facts have been briefed and discussed in the decision of Conner's first appeal and the state will not repeat that effort here. Those facts are irrelevant to the issue raised.

II. ARGUMENT

A. THE MOTION WAS NOT PROPERLY BEFORE THE TRIAL COURT, THE TRIAL COURT MADE NO APPEALABLE DECISION ON THE MOTION, THE NEWLY DISCOVERED EVIDENCE MOTION DID NOT ADDRESS NEWLY DISCOVERED EVIDENCE, AND THE MOTION LACKED CREDIBILITY.

Conner claims the trial court erred by not following the procedures for disposition of a CrR 7.8 motion. The record reflects, however, that the trial court passed no judgment on the motion either granting or denying it. The trial court ruled that the motion was not properly before the court. Moreover, since there is no final judgment on the issue raised, the matter

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firearm enhancements.

[3] However, at resentencing, the prosecutor said she recollected that the offer was for 45

is not properly appealable under RAP 2.2. As to the possible merit of the claim, Conner asserts no newly discovered evidence in this newly discovered evidence claim and much of what he asserts fails the credibility prong of the newly discovered evidence test because it is not true. The trial court's ruling here is essentially a striking of the motion without prejudice to refile. Conner's remedy is to refile and properly note the CrR 7.8 motion.

First, CrR 8.1 refers to CR 6 regarding time considerations in a criminal case. CR 6 (d) requires that a written motion and notice of the hearing thereof "shall be served not later than 5 days before the time specified for the hearing." In the present case, the record reflects that Conner filed his CrR 7.8 motion on February 29, 2016. CP 107. However, nowhere in the record does it say that Conner actually noted his motion for the date of the resentencing. Thus his sentencing counsel's remark that he, counsel, intended to assist Conner in noting up the motion. RP, 3/25/16, 8. The trial court was correct that the motion was not properly before it and this coupled with defense counsel's intimation that he was not prepared to address the issue and did not want the trial court to rule on it at the resentencing hearing militates against a finding of error. The trial court did not err by not following the procedure of CrR 7.8 (c)

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years. RP 4.

because the trial court did not decide the motion.

Second, because the trial court did not decide Conner's motion, the issue is not properly before this Court. Rule of Appellate Procedure 2.2 controls what superior court decisions may be appealed. Subsection (a) of RAP 2.2 states that one may appeal from various "superior court decisions." Here, the superior court made no decision on the merits. Further, subsection (a) (10) is more specific indicating that a party may appeal "[a]n order *granting or denying* a motion to vacate a judgment." (emphasis added). The failure "to mention a particular proceeding in RAP 2.2 (a) indicates [the Supreme Court's] intent that the matter be reviewable solely under the discretionary review guidelines of RAP 2.3." *In re J.W.*, 111Wn. App. 180, 185, 43 P.3d 1273 (2002) (alteration by the court), *citing In re Chubb,* 112 Wn.2d 719, 773 P.2d 851 (1992). Here, again, the superior court neither granted nor denied Conner's motion. Thus, in the present posture, the issue is not appealable. The motion was stricken, at least in part by defense counsel's request, and Conner has not properly re-noted it.

State v. Flaherty, 177 Wn.2d 90, 296 P.3d 904 (2013), cited by Conner, does not change this result. In that case, the superior court had refused to even file a defendant's CrR 7.8 because it was untimely and RCW 10.73.090 (1) provides that such a collateral attack "may not be

filed" if it is more than a year from judgment and sentence. Id. at 93. The Supreme Court had little trouble reversing, saying that "it is the court's function, not the clerk's, to decide whether a collateral challenge is timely." Id. The case, then, concerns what is to be done with an untimely collateral attack and does not address the procedural posture of the present case.

Similarly, *In re McCready*, 100 Wn.App. 259, 996 P.2d 658 (2000), cited by Conner, does not address the present procedural issue. That case deals with the failure of trial counsel to advise the defendant of his minimum sentence. That issue may go to the merits of Conner's motion but not until it is properly noted and actually being decided by the superior court.

Conner proceeded under CrR 7.8 (c) (2). This newly discovered evidence reason for relief from judgment has questionable application to the present facts.

> A trial court will not grant a new trial on the basis of newly discovered evidence unless the moving party demonstrates that the evidence "(1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching." *State v. Williams*, 96 Wash.2d 215, 223, 634 P.2d 868 (1981). The absence of any one of these factors is grounds to deny a new trial.

State v. Glassman, 160 Wn. App. 600, 609, 248 P.3d 155 (2011), *rev denied* 172 Wn.2d 1002 (2011). Had the trial court ruled on Conner's

motion, that decision would be reviewed for abuse of discretion. Id. at 608. Here, Conner asserts ineffective assistance of counsel for an alleged error that would have been extant at the time of trial. It is unclear why this is newly discovered. The record is clear that Conner was well advised of the risk he took by going to trial. Further, this outside-the-record claim will not change the result of the trial—the claim does not address evidence in the case. At bottom, Conner's motion does not address newly discovered evidence that is material to the case and was thus improper in its basis as well as in his failure to properly note it. Moreover, even if this issue can be stretched into a new evidence claim, in considering a new evidence claim "the trial court considers the credibility, significance, and cogency of the proffered evidence." Id. at 609.

A credibility determination is important here because it is obvious from the record that much of Conner's complaint herein fails the credibility prong of the test because it is simply not true. The record reflects that he was present in open court when his attorney, Mr. Longacre, said out loud how much time he was looking at, including an estimate that his firearm enhancements alone would get him 70 years (actual number is 65). Conner was unmoved by this knowledge and proceeded to trial. Moreover, the trial court specifically addressed each firearm enhancement with Conner out loud in open court. Conner said that he understood.

Now, Conner comes to court alleging that he did not even know about the firearms enhancements until sentencing and he globally did not understand his risk. After sentencing, he wrote in his own PRP that he refused to plead guilty to much lower level crimes. His credibility on the merits of his motion is questionable. More likely that Conner researched Mr. Longacres's problems with the bar after the fact and is now attempting to revise the history of his case in an effort to procure a new trial.

It remains that an actual plea offer is not in this record. And whether or not the same was communicated to Conner thus remains an issue. It falls to Conner to properly note the motion, with an appropriate basis. If he does so, there is no reason to suppose that the trial court will not follow the appropriate procedures under CrR 7.8 (c). Meanwhile, since there was no decision below to appeal, the present appeal is unripe and should be denied.

B. THE STATE WILL NOT SEEK APPELLATE COSTS.

Conner next claims that he is indigent and if the state substantially prevails herein, he should not be assessed appellate costs. The state will not seek appellate costs. Conner received a 1,148 month sentence and the state sees no likelihood of collecting any costs.

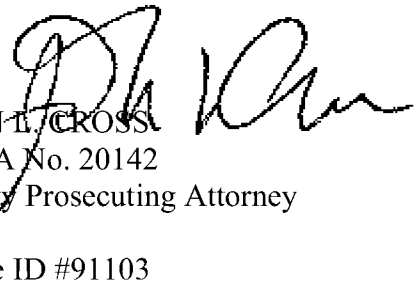
III. CONCLUSION

For the foregoing reasons, Conner's conviction and sentence should be affirmed.

DATED October 12, 2016.

Respectfully submitted,

TINA R. ROBINSON
Prosecuting Attorney



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